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No. 81-2321

In the Supreme Court of the United States

OCTOBER TERM, 1982

DOYLE E. WAIDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Claims correctly held that the Immigration and Naturalization Service did not violate Section 525 of the Bankruptcy Reform Act of 1978 in dismissing petitioner from his probationary position as Border Patrol Agent on the ground of excessive indebtedness.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Carter v. *Forrestal*, 175 F. 2d 364, cert. denied, 338 U.S. 832 10

Dennis v. *Blount*, 497 F. 2d 1305 10

Gahan, In re, 279 N.W.2d 826 7

Grimes v. *Hoschler*, 12 Cal. 3d 305, 525 P.2d 65, 115 Cal. Rptr. 625, cert. denied, 420 U.S. 973 11

Hicks, In re, 133 F. 739 11

Jenkins v. *Macy*, 357 F. 2d 62 10

Local Loan Co. v. *Hunt*, 292 U.S. 234 6

Loftin, In re, 327 So. 2d 543, writ denied, 331 So. 2d 851 ..... 6, 11

Marshall v. *District of Columbia Government*, 559 F. 2d 726 ..... 7, 9

McEachern v. *Macy*, 341 F. 2d 895 10

Non-Resident Taxpayers Association v. *Municipality of Philadelphia*, 478 F. 2d 456 10

Perez v. *Campbell*, 402 U.S. 637 ..... 5, 6, 7, 11

Page

Cases—Continued:

Robinson v. *Blount*, 472 F. 2d 839 10

Rutledge v. *City of Shreveport*, 387 F. Supp. 1277, appeal dismissed, No. 75-1775 (5th Cir. Sept. 14, 1976) 11

Terry, In re, 7 Bankr. 880 6

Statutes and regulation:

Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. IV) 525 ..... 3, 5, 7, 8

5 C.F.R. 315.804 4

Miscellaneous:

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. (1977) 8

S. Rep. No. 95-989, 95th Cong., 2d Sess. (1978) 7

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. A-1 to A-10) is not reported. The decision of the Federal Employee Appeals Authority (Pet. App. A-11 to A-17) is not reported.

JURISDICTION

The order of the Court of Claims was entered on January 29, 1982. Petitioner's motion for rehearing was denied on March 19, 1982 (Pet. App. A-20). The petition for a writ of certiorari was filed on June 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

1. On July 31, 1977, petitioner received a career-conditional appointment as a Border Patrol Agent with the Immigration and Naturalization Service (INS), subject to satisfactory completion of a one-year probationary period

(Pet. App. A-2). On July 26, 1978, prior to completion of his probationary period, the INS informed petitioner in writing (*id.* at A-28 to A-29) that his employment would be terminated, effective July 29, 1978, because of

> your excessive indebtedness which reflects unfavorably upon this Service and further reflects adversely upon the Government, as your employer. The fact that you allowed yourself to incur debts to the point that you were not able to discharge them shows that you lack the judgment required of an officer of this Service.

Petitioner's discharge was based on Section 3-13 of the Border Patrol Handbook of the INS (Pet. App. A-25), which reads as follows:

> Failure on the part of an officer to pay his just debts quickly, will bring the Service into disrepute very quickly. As a part of his responsibility to conduct himself properly, an agent is expected to attend to his personal financial obligations. Failure to do so may be deemed sufficient cause for disciplinary action, the most serious of which can be dismissal.

Moreover, the Service Manual of the INS (*id.* at A-27) states: "As part of your obligations to conduct yourself so as to reflect favorably on the Service, you are expected to attend properly and promptly to your personal obligations."

The record indicates that petitioner had declared bankruptcy in 1971 and had filed for bankruptcy a second time in May 1978 (Pet. App. A-3). After INS officials learned of petitioner's May 1978 filing, he was interviewed concerning the circumstances surrounding his indebtedness and bankruptcy. When questioned about whether he had attempted to resolve his indebtedness by consolidating his debts and negotiating a loan to cover them, petitioner indicated that he had made one unsuccessful attempt to do so, but that

attempt apparently was not made until after he had filed for bankruptcy in May 1978 (*id.* at A-31).

2. Petitioner appealed his dismissal to the Federal Employee Appeals Authority, which upheld his discharge (Pet. App. A-15). After exhausting his administrative remedies,[1] petitioner filed suit in the United States Court of Claims, asserting various procedural and substantive defects in the decision to dismiss him and seeking reinstatement and back pay. Petitioner contended, *inter alia*, that his dismissal resulted from his May 1978 bankruptcy filing and therefore was in violation of his right to declare bankruptcy (*id.* at A-3).

The Court of Claims granted the government's motion for summary judgment and dismissed petitioner's action. The court concluded that petitioner had been dismissed "not for filing a bankruptcy petition, but because his continued excessive indebtedness reflected unfavorably upon the INS and the Government" (Pet. App. A-4). The court observed that the Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. IV) 525, was not applicable to petitioner's case, but that in any event the notes accompanying that section indicated that it was designed to prohibit an employee's termination based *solely* on bankruptcy and did not prohibit consideration of other factors, such as future financial responsibility or ability (Pet. App. A-4 n.2).[2] The

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[1]The FEAA found that petitioner had raised no adjudicable issue, since he had not alleged any prohibited discrimination (Pet. App. A-11, A-14). Petitioner requested reconsideration of the FEAA decision by the Merit Systems Protection Board, the successor agency to the FEAA. The Board, after review of the record, denied petitioner's request (*id.* at A-19).

[2]Section 525 provides in part that a governmental unit may not "terminate the employment of * * * a person that is or has been a * * * bankrupt or a debtor under the Bankruptcy Act * * * solely because such bankrupt or debtor is or has been * * * a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of

court noted that petitioner, as an INS employee, was bound to comply with the provision of the Border Patrol Handbook regarding indebtedness (*id.* at A-4). The court observed that there was compelling authority for the proposition that federal agencies may consider the fiscal responsibility of their employees when making personnel decisions and that such a policy was particularly appropriate when employees are possible bribery targets (*id.* at A-5 to A-6). Finally, the court concluded that petitioner had been terminated on the ground of post-appointment conditions—continuing indebtedness and failure to make any effort to pay creditors or to work out some financial arrangements with them—so that the INS was not required to follow certain procedures applicable to termination for pre-appointment conditions (*id.* at A-8).[3]

ARGUMENT

Petitioner contends that his dismissal contravenes federal bankruptcy policy. However, the Court of Claims correctly concluded that petitioner was dismissed not for filing a bankruptcy petition, but rather because of his continued excessive indebtedness, and that the latter cause constituted a proper ground for dismissal in view of the nature of petitioner's position. This decision, which does not conflict with the ruling of any other court, does not warrant further review.

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the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act."

[3]The court found that the termination letter sent to petitioner on July 26, 1978, met the requirements of the applicable regulation, 5 C.F.R. 315.804 (Pet. App. A-9 n.3). Petitioner has not raised in this Court any question concerning the procedures used in connection with his dismissal.

1. Petitioner urges that his dismissal violates the Bankruptcy Reform Act of 1978, 11 U.S.C. (Supp. IV) 525, which prohibits termination of employment solely because an individual is or has been a bankrupt or debtor under the federal bankruptcy statutes. However, Section 525 did not come into effect until October 1, 1979, more than a year after petitioner's dismissal. Thus, the Court of Claims correctly concluded that the section does not apply to petitioner's case (Pet. App. A-4 n.2).[4]

2. Even if Section 525 had been in effect at the time of petitioner's dismissal, there would have been no violation of the statute. The legislative history of the Bankruptcy Reform Act shows that Section 525 was designed to codify the principle articulated by this Court in *Perez* v. *Campbell*, 402 U.S. 637 (1971) (Pet. App. A-33, A-37). In *Perez*, the Court struck down the portion of the Arizona Motor Vehicle Safety Responsibility Act that required suspension of an individual's driver's license if a judgment resulting from an automobile accident remained unpaid, even after that judgment had been discharged in bankruptcy. The Court concluded that the effect of the provision was to frustrate the purpose of the Bankruptcy Act, which is to

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[4]Petitioner argues that Section 525 should be applicable because his action was filed in the Court of Claims in January 1980, after Section 525 had gone into effect (Pet. 5 n.13). However, it is the date of the alleged wrong that is significant, not the date the suit was filed.

give debtors "a new opportunity in life." 402 U.S. at 648, quoting *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934).

The statute at issue in *Perez* had both the purpose and effect of placing pressure on individuals to pay particular debts that had been discharged in bankruptcy. No such pressure is involved in petitioner's dismissal. The INS policy is directed toward preventing the accumulation of excessive indebtedness, not forcing repayment of debts that already have been discharged in bankruptcy. Moreover, the policy is not framed so as to discourage declaration of bankruptcy, but rather is designed to deter an individual from incurring indebtedness long before he reaches the point at which he is forced to declare bankruptcy and to identify those individuals whose chronic indebtedness reflects a lack of judgment.[5]

The principle underlying *Perez* does not suggest that an employer may never consider an employee's excessive indebtedness, merely because he has filed for banktruptcy. The "fresh start" policy, which was central to *Perez*, is not so broad as to require the INS to ignore petitioner's indebtedness in deciding whether he was fit for permanent employment as a Border Patrol Agent. Otherwise, an employee would be able to use a bankruptcy filing as a shield against any adverse action that an employer could take on the basis of the employee's indebtedness.[6] As the

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[5]See *In re Loftin*, 327 So.2d 543, 547 n.4 (La. Ct. App.), writ denied, 331 So.2d 851 (La. 1976), in which the court distinguished the rule prohibiting declaration of bankruptcy at issue in that case from a rule against incurring and failing to pay debts.

[6]See *In re Terry*, 7 Bankr. 880, 881-882 (Bankr. E.D. Va. 1980) (fact that bankruptcy may have triggered firing should not be used to forestall discharge that was otherwise due).

District of Columbia Circuit held in *Marshall* v. *District of Columbia Government*, 559 F. 2d 726, 729 (1977) (emphasis in original; footnote omitted), *Perez* does not even require an employer to ignore the bankruptcy itself as an indicator of an individual's qualifications for a sensitive position:

> The bankruptcy statute gives a bankrupt "a new opportunity in life and a clear field for future effort unhampered by the pressure and discouragement of preexisting debt" but it does not wipe out the *fact* of a prior bankruptcy. Nor does it prohibit employers from using the *fact* of bankruptcy in considering whether the past record of a job applicant merits his consideration for employment.[7]

In the present case the INS did not base its decision to dismiss on the fact of petitioner's bankruptcy filing alone, but rather looked to the overall circumstances of his excessive indebtedness.

The Senate report accompanying Section 525 indicates that the section was intended to prohibit an employee's termination "based *solely* on the basis of the bankruptcy, on the basis of insolvency before or during bankruptcy prior to a determination of discharge or on the basis of nonpayment of a debt discharged in the bankruptcy case." 11 U.S.C. (Supp. IV) 525 note (emphasis added), citing S. Rep. No. 95-989, 95th Cong., 2d Sess. (1978); Pet. App. A-34. The Senate report goes on to state that the section "does not prohibit consideration of other factors, such as future financial responsibility or ability." 11 U.S.C. (Supp. IV) 525 note. Thus, Section 525 does not prevent an employer from

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[7]Cf. *In re Gahan*, 279 N.W.2d 826 (Minn. 1979) (fact of bankruptcy may not be considered, but constitutional limitations do not preclude court from inquiring into bar applicant's responsibility or moral character in financial matters).

considering even bankruptcy itself as one factor in evaluating an employee's fitness.

The House report confirms that an employer may consider circumstances surrounding an employee's bankruptcy. The House report states (H.R. Rep. No. 95-595, 95th Cong., 1st Sess. (1977); Pet. App. A-40):

> The prohibition does not extend so far as to prohibit examination of the factors surrounding the bankruptcy, the imposition of financial responsibility rules if they are not imposed only on former bankrupts, or the examination of prospective financial condition or managerial ability. The purpose of the section is to prevent an automatic reaction against an individual for availing himself of the protection of the bankruptcy laws.

The House report adds that "in those cases where the causes of a bankruptcy are intimately connected with the license, grant, or employment in question, an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy" (*id.* at A-41).

The statements in the legislative history make clear that Section 525 does not preclude an employer from investigating an employee's financial condition and even taking into account circumstances surrounding the employee's bankruptcy as a means of evaluating the employee's fitness for a particular position. The INS's actions in this case were consistent with the guidelines described in the legislative history. Although it was petitioner's bankruptcy filing that called his debts to the attention of the INS, petitioner's discharge was not an automatic reaction to his bankruptcy. Rather, INS officials questioned petitioner about his debts, the circumstances surrounding his bankruptcy, and his

efforts to repay or reschedule his financial obligations, giving petitioner an opportunity to explain his financial situation.[8]

The INS policy against excessive indebtedness is related to the agency's concern with job-related characteristics, such as future financial responsibility and degree of judgment. Both the Border Patrol Handbook and the INS Service Manual stress the importance of paying just debts in a timely manner (Pet. App. A-25, A-27). As the Court of Claims observed, this policy is particularly appropriate in the case of employees who are possible bribery targets (*id.* at A-6). The District of Columbia Circuit also has recognized the reasonableness of such a policy in discussing a refusal to employ an applicant as a police officer on the ground that he had previously filed for bankruptcy. See *Marshall* v. *District of Columbia Government, supra*, (559 F. 2d at 729-730 (emphasis in original)):[9]

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[8]Petitioner implies that there may have been mitigating circumstances surrounding his bankruptcy (Pet. 10). However, he does not suggest what these circumstances are. Nor is there any indication that he was not given an opportunity to explain any such circumstances to INS officials.

[9]Petitioner attempts (Pet. 9 n.18) to distinguish *Marshall* on several grounds, none of which is successful. First, the principle stated in *Marshall* is not affected by the fact that the plaintiff in *Marshall* had been an applicant for employment, while petitioner was a probationary employee. In both cases the interest of the government agency in avoiding fiscally irresponsible employees is the same. Second, although petitioner was not asked about his financial status in his employment application, INS guidelines clearly spelled out INS policy on this subject, and the INS took action as soon as it learned of petitioner's situation. Finally, it is irrelevant that the refusal to employ the plaintiff in *Marshall* was not in reaction to his *recently* having filed bankruptcy. In fact, the plaintiff in *Marshall* clearly was rejected on the ground that he had "previously" been adjudged bankrupt (559 F. 2d at 727), while the Court of Claims found that petitioner's dismissal was not the result of his bankruptcy filing.

> The *fact* that one has been unable to successfully manage his financial affairs in the past might well be considered a sufficient deficiency in his qualifications to justify a refusal to employ him as a police officer. Police officers, because of the nature of their work, are frequent targets of bribery attempts. The District of Columbia might well desire, to the maximum extent possible, to insulate its law enforcement from such corrupt endeavors by refusing to employ officers who, because they were unable to successfully manage their financial affairs in the past might be unable to do so while they were police officers and thus be more susceptible to bribery than other applicants who had demonstrated such capability.

Similar considerations obviously apply to the position of Border Patrol Agent, which involves investigation of illegal traffic in drugs and aliens (Pet. App. A-10).[10]

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[10]A number of courts have concluded that federal agencies have a legitimate interest in ensuring that their employees do not accumulate unreasonable debts. On two occasions the Ninth Circuit has upheld the discharge of postal employees pursuant to a Postal Service regulation requiring employees to pay their just debts in a timely and proper manner. See *Dennis* v. *Blount*, 497 F. 2d 1305 (1974); *Robinson* v. *Blount*, 472 F. 2d 839 (1973). See also *Jenkins* v. *Macy*, 357 F. 2d 62 (8th Cir. 1966), and *McEachern* v. *Macy*, 341 F. 2d 895 (4th Cir. 1965), in which the courts upheld the discharge of employees who had failed to pay debts following receipt of numerous complaints which tended to bring discredit on the employer. While the justifications cited in these cases are not directly applicable to petitioner's case, they confirm the reasonableness of the INS policy toward excessive and recurring indebtedness. See also *Non-Resident Taxpayers Association* v. *Municipality of Philadelphia*, 478 F. 2d 456, 460 (3d Cir. 1973); *Carter* v. *Forrestal*, 175 F. 2d 364 (D.C. Cir.), cert. denied, 338 U.S. 832 (1949).

Petitioner argues that his indebtedness had no effect on his employment because the INS received no complaints from petitioner's creditors during his year of probationary employment (Pet. 9-10). This misses the point of INS's concern about indebtedness, which was based on the reasonable belief that Border Patrol Agents who accumulate heavy debts are more likely to be susceptible to bribery attempts.

The INS letter of July 27, 1978, states that petitioner was being dismissed not because of his bankruptcy filing, but because of his excessive indebtedness, which reflected adversely on the INS and on the government and indicated a lack of judgment necessary for INS officers.[11] The Court of Claims specifically found that petitioner was dismissed for excessive indebtedness, not for his bankruptcy filing. Petitioner has not challenged the factual accuracy of INS's conclusion concerning his excessive indebtedness. It is clear that the dismissal was not based "solely" on petitioner's bankruptcy, but was based on his excessive indebtedness. The INS reasonably concluded that such indebtedness was likely to have an adverse effect on petitioner's job performance and was an indication of lack of the degree of judgment necessary for his position. Thus, petitioner's dismissal was proper not only under *Perez*, but also under the standards subsequently established by Congress in Section 525.[12]

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[11]In addition, petitioner was informed during an interview with INS officials in July 1978 that he would be terminated because of his "continuing chronic reoccurring indebtedness" (Pet. App. A-32). The Federal Employee Appeals Authority concluded that petitioner was terminated for "excessive indebtedness" (*id.* at A-13).

[12]*Rutledge* v. *City of Shreveport*, 387 F. Supp. 1277 (W.D. La. 1975), appeal dismissed, No. 75-1775 (5th Cir., Sept. 14, 1976), cited by petitioner (Pet. 7 n.15), involved a police officer who was discharged solely on the ground that he had filed for bankruptcy, pursuant to a regulation requiring automatic discharge in such circumstances. Here, by contrast, the Court of Claims found that petitioner was not discharged on the basis of his bankruptcy filing. The other cases cited by petitioner also concerned actions taken solely on the basis of bankruptcy. See *In re Loftin, supra* (automatic termination of fireman because of bankruptcy filing); *Grimes* v. *Hoschler*, 12 Cal. 3d 305, 525 P.2d 65, 115 Cal. Rptr. 625 (1974), cert. denied, 420 U.S. 973 (1975) (loss of license because certain debts had been discharged in bankruptcy). In *In re Hicks*, 133 F. 739 (N.D.N.Y. 1905), a fireman was terminated because of failure to pay a particular debt that was dischargeable in the bankruptcy action he had initiated. The court noted that there was no indication that the debt, which amounted to $37.10, impaired the discipline of the fire department in any way. *Id.* at 741.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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